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Is International Law a Hartian Legal System?

Abstract

H.L.A. Hart proposed one of the most influential accounts of law, according to which law is a union of primary rules, which guide the behavior of the law's subjects, and secondary rules, which guide officials in recognizing, changing and interpreting primary rules. Writing at the end of the 1950s, Hart had serious doubts that international law meets the necessary criteria for a legal system. But there are several reasons to reconsider his position. One is that international law grew significantly since then. But a more important reason is that Hart provided an oversimplified description of the necessary and sufficient conditions for law provided by his account, and therefore of the nature of the international legal order. A proper understanding of Hart's view gives us a richer and more accurate understanding of the essential features of law, but also a less precise yardstick by which to measure and characterize the character of various systems of rules, including international law. According to this new yardstick, international law fails to meet the criteria for a Hartian legal system, but for different reasons than Hart identified.

Keywords: International law, legal system, H.L.A. Hart, rule of recognition, primary and secondary rules.

The authority of international law depends in part on whether it has features that make it worthy of the name of law. Law-worthiness has been traditionally associated with the existence of a sovereign powerful enough to demand obedience (Thomas Hobbes, John Austin), with the close alignment of legal rules with basic moral requirements (John Finnis), or with structural features of the set of rules which guide behavior. [1]

H.L.A. Hart proposed this last view, which is now considered one of the most influential accounts of law. Law is a union of primary rules, which guide the behavior of the law's subjects, and secondary rules, which guide officials in recognizing, changing, and interpreting primary rules. Law is thus technically best understood as *a legal system* in which secondary rules serve in the identification of primary rules. The parsimony of this account is attractive. To ascertain whether a set of rules counts as law, we evaluate whether primary rules are generally obeyed, and whether secondary rules of change and adjudication serve for the public officials' recognition and application of primary rules. These two criteria for the identification of law enable us to evaluate legal orders, including international law, with a relatively small and precise set of tools.

Hart believed that there are many examples of legal systems that meet his two criteria, and the law of many advanced democracies certainly do. However, he considered international law to be in a twilight area. Writing at the end of the 1950s (his *Concept of Law* was published in 1961), Hart had serious doubts that it meets the necessary criteria for a legal system. Indeed, several times in the book he likened international law to primitive legal systems, which were not

[1] Thomas Hobbes, *Leviathan: With Selected Variants from the Latin Edition of 1668*, ed. Edwin Curley (Hackett Pub Co, 1994); John Austin, *The Province of Jurisprudence Determined* (Memphis, TN: General Books LLC, 2012); John Finnis, *Natural Law And Natural Rights*, 2 edition (New York: Oxford University Press, U.S.A., 2011); H.L.A. Hart, *The Concept of Law*, ed. Leslie Green, 3rd. edition (Oxford, United Kingdom: Oxford University Press, USA, 2012).

fully grown legal orders, since for the most part they lacked secondary rules.[2] But there are several reasons to reconsider his position. One is that international law grew significantly since then. But a more important reason is that Hart provided an oversimplified description of the necessary and sufficient conditions for law provided by his account, and therefore of the nature of the international legal order. Hart analysis of international law was doubly misleading. By denying the existence of an international rule of recognition, he may have mischaracterized the nature of an international legal order in which such a rule was already operating at the time his view was taking shape, but also the necessary features international law must meet in order to qualify as a legal system.

I will argue that Hart overstated the simplicity of his account of law, and that ultimately, ascertaining whether international law meets Hart's criteria for a legal system is a much more laborious exercise. The point of the argument is not to raise questions about need to better understand international law, but to cast doubts on whether parsimonious accounts are possible and desirable given the complexity of legal orders. International law is an especially suitable test case for this hypothesis as it unsettles many of the preconceptions we might develop about the paradigmatic cases of law derived from national legal systems.

This reconsideration of Hart's account carries a high theoretical payoff. Hart's concepts for describing and understanding law are now part of the shared vocabulary of scholars of law and legal theory. Moreover, his criteria capture plausible features of the law − systematicity, internal validity, acceptance by subjects − and whether these features are sufficient as a test for any system of laws is worth investigating.[3] But the practical importance of this exercise is no less salient. Whether a rule is part of a legal system speaks to its validity, and thus, indirectly, to the

[2] Hart, *The Concept of Law*, 4–5.
[3] Leslie Green, "The Concept of Law Revisited," ed. H. L. A. Hart, *Michigan Law Review* 94, no. 6 (1996): 1688.

subjects' evaluation of whether it is a rule that is binding on them. Hart's project was positivist, preoccupied with identifying the descriptive features of law, and not the moral authority of the law, or the reasons the subjects may have to comply with its requirements. Yet although the positivist and the normative project are distinct, they are related. That is, whether a group a rules has the character of a legal system may offer one, although not the only, reason for the addressees of the rules to see them as binding.[4] The proof that international law has the features of a legal system may offer its subjects − states, individuals, organizations − an additional reason for acting in compliance with its demands.[5]

It is no surprise then that scholars who in recent years have engaged with Hart's view on international law have been misled by his account. Jeremy Waldron, Samantha Besson, and Mehrdad Payandeh have sought to vindicate the place of international law in the pantheon of Hartian legal systems.[6] However, these scholars have underestimated the complexity of Hart's criteria and the implication of this complexity for assessing the character of international law. In particular, they have used the existence of a rule of recognition in international law as a reason to cast doubt on Hart's view that international law is not a legal system. My argument extends and deepens these analyses to give us a better picture both of Hart's account and the place of international law within it. It shows that even if international law does contain a rule of

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[4] It is important to emphasize that most legal positivists see these two aspects of the law, validity and authority, as distinct, as John Gardner clearly points out in his "Legal Positivism: 5½ Myths," *The American Journal of Jurisprudence* 46, no. 1 (January 1, 2001): 204–7. However, it is likely they are tightly connected in the eyes of the general public, i.e. the law's subjects.

[5] By dismissing international law as not quite worthy of being called law in the technical sense, Hart himself might have given the impression that it is not worth studying and understanding. Mehrdad Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A. Hart," *European Journal of International Law* 21, no. 4 (2010): 978–79, Jeremy Waldron, 'Hart and the Principles of Legality', in M.H. Kramer *et al.* (eds), *The Legacy of H.L.A. Hart* (2008), at 67, 68–69.

[6] Jeremy Waldron, "International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?" in *Reading HLA Hart's The Concept of Law*, L. Duarte d'Alemida, J. Edwards, and A. Dolcetti eds., (Bloomsbury 2013), Samantha Besson, "Theorizing the Sources of International Law," in *The Philosophy of International Law*, ed. Samantha Besson and John Tasioulas (Oxford University Press, 2010); Mehrdad Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A. Hart."

recognition, it fails as a legal system when measured against other implicit features of Hart's account of law.

The purpose of interpreting international law through a Hartian lens is trifold: 1. To reveal important features of Harts account of law that he himself left in the background of his definition, 2. To better understand the nature of international law in light of Hart's reconstructed view, and 3. To turn a mirror on our view of law stemming from centralized, hierarchical models of law-making. A proper understanding of Hart's view gives us a richer and more accurate account of the nature of law, but also a less precise yardstick by which to measure and characterize the nature of various systems of rules, including international law. According to this new yardstick, international law is neither a primitive legal order, as Hart maintained, nor a full blown legal system, but occupies an indeterminate place in between these two opposing categories. I will show that Hart was right that international law does not meet the conditions for a legal system, but not for the reasons he identified.

In the next section I will demonstrate that the two minimum conditions which describe the union of primary and secondary rules are in fact a series of multiple interdependent conditions in which the functions performed by different secondary rules can be clearly differentiated and may not be found together in legal orders. The following section will show how, at different points in the book, Hart clearly defends the existence of other essential characteristics of law besides the two explicitly mentioned in his definition of law. By excavating and making explicit these other characteristics, we will gain a richer and more accurate picture of the nature of law. The final section will apply this reconstructed Hartian account of law to international law to show that Hart was right about the incompleteness of the international legal system, but not for the reasons he identified.

A. Two ‘Minimal Conditions’

Hart’s definition of law pithily captures the core of his view:

> ‘There are therefore *two minimum conditions necessary and sufficient for the existence of a legal system.* On the one hand, those rules of behavior which are valid according to the system’s ultimate criteria of validity must be generally obeyed, and on the other hand, its rules of recognition specifying the criteria of legal validity and its rules of change and adjudication, must be effectively accepted as common public standards of official behavior by its officials.’[7]

Hart believed that we can best explain the nature of the law as a collection of rules of varying types and purposes that stand in a special relationship to each other. The most important condition, in Hart’s view, was the union of primary and secondary rules: for there to be a legal system and not merely a collection of separate standards of behavior, primary rules must be supplemented by secondary rules enabling the subjects to discern between valid and invalid rules. Adding such secondary rules is what is necessary ‘to convert the regime of primary rules into what is indisputably a legal system.’[8] Most readers will be tempted to take the presence of primary and secondary rules as an exclusive test to identify legal maturity in marginal cases such as international law. However, I will show that while these conditions may be necessary for the identification of a legal system, they cannot be sufficient, despite Hart’s insistence to the contrary.

[7] Hart, *The Concept of Law*, 116, emphasis mine.
[8] Hart, 94.

I will start first by showing in this section that this deceptively simple description of the union of primary and secondary rules masks the presence of multiple and independently necessary conditions. According to Hart, secondary *rules of recognition* serve the 'conclusive identification of primary rules of obligation.'[9] The existence of rules of recognition is the most important criteria of legal validity, and without them we lack the unity necessary for a group of legal rules to form a system. All rules of recognition in a legal system culminate in the ultimate rule of recognition, which is primarily a social rule that identifies a legal document such as a constitution or a practice such as monarchical succession as the origin of all legal rules valid in a particular legal system. Variously described as a custom, convention, or social practice followed by most of the law's officials, the ultimate rule of recognition is at the basis of all legal systems.[10] For Hart, the existence of rules of recognition is what distinguishes primitive law, such as the law of tribal societies or international law, which he also characterized as primitive, from developed legal systems.

However, as Leslie Green pointed out, it is likely that the difference that Hart stipulated between societies with primitive law and advanced legal system is one of degree and not of kind, reflecting the extent of complexity and institutionalization of secondary norms.[11] Indeed, I will argue that no society can function without a tacit or explicit recognition of the authority or authorities with the legitimacy to make law and require obedience. In developed legal system, rules of recognition are elaborate and numerous, pointing to social norms, legal practices such as enactments by legislatures and judicial precedents, and foundational, constitutive documents as

[9] Hart, 95.
[10] For some difficulties about whether the rule of recognition should be best understood as a conventional rule see Leslie Green, "Positivism and Conventionalism," *Canadian Journal of Law and Jurisprudence* 12 (1999): 37–39; and Andrei Marmor, "Legal Conventionalism," *Legal Theory* 4, no. 4 (1998): 509–31.
[11] Green, "The Concept of Law Revisited," 1699.

sources of law, whereas in developing legal systems such rules are mostly implicit and not well-articulated.[12] I will return to this point below to show that international law has long had implicit rules of recognition, and that a set of rules creating legal obligations for states could not have operated without one.

Another important set of secondary rules are *the rules of change*, whose main purpose is to empower a legal agent to introduce new rules or to modify and repeal old ones.[13] The third set of secondary rules are those enabling the authoritative settlement of disputes, called *rules of adjudication*.[14] They will typically empower institutions such as courts, individual roles such as judges, procedures, and jurisdictions in a legal system. The rules of recognition, change and adjudication are connected on many levels. For example, when courts are empowered to make judgments about whether the law has been broken, they are also invested with the power interpret and define the law, and thus rules of adjudication often form part of a general rule of recognition.[15]

But, importantly, secondary rules need not develop together, and it is possible to have legal orders which contain some secondary rules while others are missing. For example, it is possible to have communities guided solely according to customary systems of rules, without legislatures, and therefore without rules of change, but with rules of adjudication that enable the peaceful resolution of disputes. There will be rules of recognition in such a community pointing to custom as the main source of law, but not to legislative assemblies as sources of law. So too, it is possible to have legal orders where the rules of recognition and change are well developed and institutionalized, but the rules of adjudication are absent or weakly institutionalized. Secondary

[12] Hart, *The Concept of Law*, 101.
[13] Hart, 95.
[14] Hart, 97.
[15] Hart, 97.

rules are not logically connected and they may develop at different rates even in the legal practices of mature societies.

Hart would likely not consider legal orders with partial or partially developed secondary rules as legal system proper, as some of the contrasts he draws between primitive legal orders and fully fledged legal systems show. For example, he claims that communities lacking rules of adjudication will be marred by pervasive uncertainties about the meaning and scope of application of the law, and inefficiencies in their application, while societies without rules of change will tend to be static. Uncertainty, ineffectiveness, and stasis are characteristics of primitive societies.[16] The implication of this differentiation of secondary rules according to their function is that they are *individually necessary* for the existence of a legal system, as a legal system for example lacks rules of adjudication would not be a proper legal system.

It is not just the presence of individuated secondary norms that is important, but their acceptance by officials, which must form part of a common and uniform shared practice, in the sense that most of the society's legal officials will refer to the same secondary rules as directing their behavior. But what counts as habitual obedience is difficult to specify. Hart insisted that in functioning legal orders most of the rules are 'most often obeyed than disobeyed by most of those affected,' and the obedience of the subjects is explained by a variety of reasons, including coercion, social pressure, or an attitude of acceptance of the behavioral guidelines of the law. Habitual obedience as a condition of law is a feature that Hart borrows from Austin, but Hart does not add greater precision than Austin did to the issue of how to distinguish legal orders characterized by habitual obedience from those we do not. 'Habitual obedience' remained for Hart, as it did for Austin, a 'vague and imprecise notion.'[17] This vagueness becomes especially

[16] Hart, 91–93.
[17] Hart, 23–24.

salient for assessing the status of other systems of law, such as international law, where at the margin, it matters whether we judge primary and secondary rules to be accepted and obeyed.

These complications aside, Hart's own description of the two minimal conditions obscures the significant complexity of his criteria. His two minimal conditions can be broken into six empirical and formal criteria for the identification of a legal system: 1. the existence of primary rules, which 2. are habitually obeyed by the population, and 3. the existence of rules of recognition, 4. rules of change, and 5. rules of adjudication, which 6. are accepted as common public standards by public officials. It is logically and empirically possible that a group of legal rules meet some but not all these criteria, especially systems that are evolving from embryonic ones, and international law may be such a case. For example, international law may have rule of recognition but no commonly accepted standards of adjudication for rule violations. In addition, condition 5 and 6 require 7. namely that there are at least some courts with compulsory jurisdiction, and 8. that such jurisdiction must be effective, that is, their judgments must be obeyed and be enforced coercively in the case of non-compliance. Rules 4 and 6 require the existence of 9. rule-making and rule-changing bodies, such as a legislature. Therefore, we cannot take Hart's claim that there are only two *necessary and sufficient* conditions for the existence of a legal system at face value.

David Lefkowitz emphasizes a similar point: Hart overstated the simplicity of his account in one crucial respect, namely by failing to distinguish between the 'absence or presence of secondary rules tout court,' and 'the absence of presence of a division of labor in identifying, altering, applying and enforcing.' [18] What Lefkowitz means is that Hart failed to identify as necessary conditions of law both the presence of primary and secondary rules and the presence

[18] David Lefkowitz, "What Makes Social Order Primitive? In Defense of Hart's Take on International Law" forthcoming, *Legal Philosophy*, 2018 pp. 4, 17 (article manuscript pagination).

of institutions such as courts and legislatures that interpret, apply, and enforce these rules. The ultimate rule of recognition identifies not only a set of rules arranges in a certain relationship with each other, but also a hierarchy of official bodies carrying out the functions defined by the secondary rules, such as legislatures and courts.

My analysis above is in line with this observation. The ultimate rule of recognition hides the diversity of rules and institutions necessary in complex legal orders. But it also obscures the presence of additional criteria for the identification of a legal system. Yet, before we move on to these additional criteria, it is worth dwelling on the ultimate rule of recognition, whose existence Hart denied in the case of international law. The ultimate rule of recognition is the rule that explains the validity of all other rules within a system and it is of foundational importance. The rule of recognition is usually unstated, and can be identified or 'shown' in the way in which primary rules are recognized by officials.[19] The use of 'unstated' rules of recognition is characteristic of the internal point of view.[20] The internal point of view shows that rules are accepted as standards of behavior and as reasons to act in the ways required by them. Those who adopt the internal point of view take the rules to impose obligations and to serve as the 'basis for claims, demands, admissions, criticism, or punishment.'[21]

The more Hart explains the role of the rule of recognition, the more it becomes clear that any society with rules, even primitive ones have rules of recognition. Indeed, any such society must display the 'complex social situation where a secondary rule of recognition is accepted and used for the identification of primary rules of obligation,' without which it could not function as a society held together by rules habitually obeyed by most inhabitants.[22] To habitually obey the

[19] Hart, 101.
[20] Hart, 102.
[21] Hart, 89–90.
[22] Hart, 100.

rules, the inhabitants must be able to identify, either via implicit or explicit secondary rules, how they are to distinguish the rules of obligations that apply to them. Therefore, the rule of recognition is not something that distinguishes primitive from developed legal systems, although it serves to set apart Hart's conception of law from that of Austin, who identified law with habitual obedience of a sovereign who habitually obeys no one.

The foundational rule of recognition has other features. It is ultimate and supreme, in the sense that it derives its validity from no other rule, but only from the general social practice that shows its acceptance by the relevant officials, and is supreme because it is at the highest point of a hierarchy that determines the order or precedence between various sources of law.[23] The rule of recognition can contain multiple criteria for identifying the sources of law, which can conflict with each other (statutes enacted by a legislature can conflict with the constitution), and while the rule of recognition does not resolve all such conflicts, it establishes a general order of precedence that help produce a final adjudication (at least final in the sense allowed by the institutional procedures internal to the legal system) in each particular case of conflict. Hart identified the lack of an ultimate rule of recognition as a fundamental incompleteness in a legal system, and considered it one of the main reasons that disqualified international law as a legal system.

B. Additional Conditions for the Existence of a Legal System.

So far, I have shown that Hart's 'two minimum conditions' are in fact more properly understood as nine conditions, and there are additional reasons to believe that Hart left out of his

[23] Hart, 105–10.

characterization of the necessary and sufficient conditions for a legal system other features that elsewhere he claims are essential. The most important reason to believe that these initial conditions describing the union of primary and secondary rules are not sufficient is that they fail to set apart legal systems from other systems of rules governing complex social practices. Football and tennis associations have primary rules that direct the behavior of the participants in the practice, and governing bodies which identify and interpret the rules and change them according to secondary rules. Churches, universities, and companies also have primary and secondary rules that guide the behavior of their members without constituting what we common refer to as 'law.' Leslie Green has observed as much in his introduction to Hart's *Concept of Law* when he said that given that the union of primary and secondary rules does not set apart sports leagues and law, 'there is no question of having a 'formal' test for legal system.'[24]

Hart may have misled readers when he declared these two conditions to be sufficient, and he provided ample opportunity to doubt this simplified characterization of law and resources to build a richer, more realistic account of law throughout the book. The first important clue that there are other essential elements of law comes from his criticism of the command theory of law. The command theory of law is characterized by the fact that an agent − the sovereign in Austin's case − issues orders that must be obeyed on penalty of coercive reprisal or threat of such reprisal.[25] Hart points out several fatal flaws of this account. In contrast to a simple command, law issues general directives for behavior. Law is 'general in two ways: it indicates a general type of conduct and applies to a general class of persons who are expected to see that it applies to them and to comply with it.'[26] The generality of the rules in this double sense is thus an essential

[24] Leslie Green, 'Introduction,' *The Concept of Law*, xxv.
[25] Austin, *The Province of Jurisprudence Determined*, 36.
[26] Hart, *The Concept of Law*, 21.

feature of the law. For states, general laws 'extend to all persons in its territorial boundaries.'[27] Generality need not be a feature of all areas of law, although Hart was not explicit on this point. For certain areas of law, the requirement of generality if very strong, such as for criminal law, which is paradigmatic of coercive orders backed by threats. But laws can be addressed to specific social roles (parents) or professions (lawyers) without applying to all of the persons in a state's territory. Generality is a feature of legal system that distinguishes them from other social practices such as those of a tennis association.

Hart mounted other important criticisms of John Austin theory of law which are less important for our present purposes, so a brief outline will suffice.[28] According to Hart, Austin's 'command theory' of the law was inadequate on a number of other fronts: it does not explain the sense of obligation often espoused by the law's subjects − what Hart called the internal point of view − it lacks an explanation of the continuity of law in the case of a change in sovereign, and it fails to explain a range of legal rules which can neither be properly called commands, nor are backed by sanctions. Power-conferring rules, such as the rules for the making of contracts, wills, and marriages, or the rules conferring judicial powers, are rules whose violations result in the nullity of the act, which is not best understood as a sanction in the same way as fines or imprisonment are.[29]

Hart did grant however two additional important features of Austin's account that have been left out of his identification of law with the two 'necessary and sufficient' conditions. One is that law must contain a coercive element, and this sets it apart law from social rules and

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[27] Hart, 21.
[28] Green, "The Concept of Law Revisited," 1693.
[29] Hart, *The Concept of Law*, 27–35. For Hart, power-conferring rules were best understood not as laws backed by sanctions, but laws whose consequence, if broken, would be nullity of the act undertaken. So failure to follow contract laws would render the contact void and null, and nullity is not a sanction. See especially pp. 29-30 where Hart discusses nullity. Contract laws also have provisions that are backed by sanctions, but the core of the power-conferring rules is not the sanction element, which distinguishes it from the rules of criminal law.

morality. Indeed, he claims that this is a feature people often associate with law and not other systems of social rules, and that this association is correct: 'In the case of legal rules it is very often held that the crucial difference (the element of 'must' and 'ought') consists in the fact that deviations from certain types of behavior will probably meet with hostile reactions, and in the case of legal rules be punished by officials.' Even though he rejects predictive accounts of law, Hart goes on to say: 'It is obvious that predictability of punishment is one important aspect of legal rules.'[30] He emphasizes this point again when he claims the necessity of coercion in connection to adjudication of disputes. Legal systems need agencies 'empowered to ascertain finally and authoritatively, the fact of violations,' which is best understood as requiring courts with compulsory jurisdiction. Additionally, rather than leaving punishment to the individuals affected, a specialized agency for enforcement would also be needed, suggesting that centralized enforcement is another necessary feature of a legal system.[31]

Coercion indeed is essential to law if we are to distinguish legal rules from other types of social rules that purport to guide behavior: rules of etiquette, language, and even morality. But coercion is not a necessary feature of all areas of law, as Hart rightly emphasized. Legal rules are an important subset of social rules which are sometimes made by legislature, and sometimes come into existence as customs. Some rules mandate behavior, others indicate 'what people should do to give effect to the wishes they have.'[32] The former are rules most commonly associated with the criminal law, and the latter are power-conferring rules. The existence of power-conferring rules means for Hart that law does not rest primarily, or even essentially, on

[30] Hart, 11.
[31] Hart, 93–94.
[32] Hart, 9.

coercion. Like Austin, Hart believed coercion is an essential feature of the law, but unlike Austin, he did not believe that coercion is a feature that attaches to all legal rules.[33]

Hart emphasized additional features that distinguish legal rules form other social rules. While persistence, generality, and the presence of coercive sanctions, characterize formal and institutional features of the law, he said that legal rules are also distinguished by *their content*. Any law worthy of the name must contain 'restrictions on the free use of violence, theft, and deception,' along with other rules imposing positive duties on individuals to contribute to the common life.[34] And these restrictions must apply generally: 'where there is law, there human conduct is made in some sense non-optional or obligatory,' so that no individual subject has absolute freedom over her own actions.[35] The existence of laws that restrict the use of violence, theft and deception are typically associated with criminal law, and any legal system will contain provisions that criminalize behaviors that are especially injurious to individuals and that preserve the basis of their peaceful social interaction. This will be especially relevant for evaluating international law, whose criminal law dimension is only beginning to crystalize.

We have thus far identified at least three additional conditions that a system of rules must meet in order to qualify as law in addition to the nine I have identified earlier: 10. the generality of the rules both in terms of their content and range of applicability (to all the subjects within a given territory), 11. the presence of rules that criminalize certain types of behavior injurious to individual life and liberty and to the social life of the community, and 12. the presence of coercive punishment as a response to rule violation. Criminal law emerges as an essential component of a legal system that best captures all of these three conditions. The rules governing

[33] Hart, 10–11.
[34] Hart, 91.
[35] Hart, 82.

physical violence, theft and deception must designate general categories of action that are proscribed, they apply generally to all inhabitants of a territory, and come attached to coercive sanctions for their non-observance.

Rule 8 already contains the necessity of coercive enforcement, but only in the case of non-compliance with the judgments of courts, so we can combine 8 and 12 to retain 11 conditions in all. I do not claim to have identified a complete and comprehensive list of all of the conditions that Hart discusses, so the question of whether my list identifies all the necessary and sufficient conditions for the existence of law is less important. What I showed is that Hart's criteria are significantly more numerous than he lets on, and I have pointed out some of the more plausible formal, empirical, and substantive requirements for the existence of law not captured by his definition.

Hart's obfuscation of the necessary conditions for the existence of a legal system is an understandable failure of his effort to boil down into 'minimal conditions' what is fundamentally a complex social phenomenon that resist easy schematization. By reducing the criteria for the existence of legal system to 'two' conditions, Hart conceals additional formal and substantive criteria implied in his characterization of the nature of law. These additional criteria are no less important for identifying legal systems that the two minimal criteria that Hart explicitly mentions as 'necessary and sufficient' conditions. For example, it is unlikely that Hart will describe a set of rules as a legal system if it contains rules of recognition that are widely accepted as common practice but no rules of adjudication. Also unlikely is that Hart will designate as legal system sets of laws that contain no primary rules making certain kinds of conduct obligatory for all, or general rules criminalizing certain behaviors but no enforcement. This finer-grained description of Hart's criteria will prove especially important for assessing the character of international law.

C. Is International Law a Hartian Legal System?

In the much-criticized chapter X of his book, Hart takes up the question of whether international law is law properly so called, by which he meant a legal system that met his necessary and sufficient conditions.[36] Hart is not so much interested in policing the use of the word 'law,' and is perfectly comfortable to refer to international law as law, acknowledging the fact that in ordinary language the words 'law' and 'legal system' may be used more loosely. But he is interested to ascertain whether on the stricter, more technical conception of law that he deploys, international law falls short, and he argues that it does. [37] I will now provide the final step in the argument to show that Hart was likely right in his judgment, but not for the reasons that he puts forward.

Hart's main reason for refusing to grant international law the status of legal system was that in his view, international law was only a 'set of separate primary rules of obligation which are not united,' lacking the most important feature of a unitary system, that of an ultimate rule of recognition.[38] The union of primary and secondary rules in international law is as necessary as in domestic law because it distinguishes law as a means of social control from two 'juristic

[36] Waldron for instance called it 'an embarrassing chapter,' and claimed that it displayed 'a frustrating combination of insight and obtuseness.' Jeremy Waldron, "International Law: 'A Relatively Small and Unimportant' Part of Jurisprudence?" 209.

[37] Mehrdad Payandeh says that Hart denies that the existence of a rule of recognition is a necessary condition for international law. I think this is a misreading of Hart. Payandeh is right that Hart believes international law can be called law, however he makes this claim in the context of distinguishing between looser and more precise ways to use the word 'law.' As a descriptive term 'law' is used in different ways, and there are acceptable uses to describe the system of international norms. But when it comes to identifying law with a *Hartian legal system*, Harts makes it clear that the rule of recognition must be present. Mehrdad Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A. Hart," 977; Hart, *The Concept of Law*, 213–14.

[38] Hart, 233.

extremes:' orders backed by threats and rules of morality.[39] Waldron, Payandeh, and others have gone to considerable lengths to challenge Hart on this point, but they have failed to distinguish the fact that Hart makes both a conceptual and an empirical claim.[40] The conceptual claim is that primary legal rules can exist without a basic rule of recognition. The empirical claim is that international law lacks such a rule: 'but it is submitted that there is no basic rule providing general criteria of validity for the rules of international law, and that the rules which are in fact operative constitute *not a system* but a set of rules.'[41] Hart is wrong on both the conceptual and empirical claim. For he is wrong that a basic rule of recognition is not necessary for the operation of a complex legal system such as international law, and he is also wrong that it cannot be observed empirically as a shared set of social practices that guide the identification of valid rules within the system by the system's officials. Hart does leave open the possibility that international law may be in transition to a system that relies on a rule of recognition. But in denying the existence of a rule of recognition at the time of the writing of the book, he in fact was blind to the operation of a rule of recognition that crystalized significantly earlier than the time of writing his book, and which can still be identified today as the foundation of international law, although in a more complex form.

The necessity of a rule of recognition for primary rules is simply that in any society individual subjects of the law and legal officials must be able to distinguish the legal rules of their own society from those of other societies, and legal rules from social rules more generally or from rules of etiquette or morality. When in a conversation with my neighbor she says, 'x is the law around here,' I must be able to ascertain whether she is telling the truth or making up the

[39] Hart, 213.
[40] Waldron, "International Law: A 'Relatively Small and Unimportant' Part of Jurisprudence?" 217, 220-222, Payandeh, "The Concept of International Law" 989-990.
[41] Ibid, 236 (emphasis mine).

existence of a legal rule. In simple, customary legal system, to my subsequent question ‘why is this the law?’ she may reply ‘because we have always done x this way,’ and in monarchical systems the reply may be ‘because King Rex says so.’ In the former case, by saying ‘because we have always done x this way,’ she has identified the rule of obedience to custom as the rule of recognition, while in the latter case the rule of recognition is the principle “whatever King Rex enacts as law is law.’ In legal orders with a long history, numerous legal rules and complex rules of recognition, such as the United States, to my question ‘why is this the law?’ my neighbor might reply ‘because it was enacted as a statute by the state legislature which gets its authority from the US constitution,’ or if this train of reasoning is unfamiliar to her, ‘you can ask a lawyer/judge/legal official, they may be able to explain,’ and the legal official will point to the chain of legal validity that starts with the United States’ constitution. The law’s subjects and officials (and sometimes only the latter), will be capable to ascertain the sources of law and the criteria of legal validity in any legal system. Therefore, the rule of recognition is a conceptual necessity, because it is implicit in the identification of primary rules. Most subjects and officials must be able to engage in this process of identification if law is to function as a set of general behavioral guidelines that apply to all.

States need criteria for distinguishing international law from the law of other states, from the law of subunits of states, or from rules that are part of the morality of states without being proper law. France for example, needs to tell apart the rules of international treaties and international custom from its own rules, the rules of European Union, or the rules of the United Kingdom. Each of these different systems of law have a different status in France. Due to sovereign immunity, the legal rules of the UK will for the most part fail to have effect in

France.[42] Due to France's membership, the laws of the European Union will apply automatically with important exceptions, while with respect to international law only treaties that France has explicitly agreed to as well as most international customs have force and only in the manner accepted by France and prescribed by treaties and international legal institutions.

To be able to make these distinctions, France will need to appeal to widely accepted criteria for identifying the sources of international law. International law is in the fortunate position of having some (but not all) of its most important sources identified explicitly in the United Nations Charter. Since its passing in 1945, Article 38 of the Statute of the International Court of Justice has been recognized almost unanimously as identifying the main sources of international law.[43] Article 38 states that they are:

> 'a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
> b. international custom, as evidence of a general practice accepted as law;
> c. the general principles of law recognized by civilized nations;
> d. judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'

The four sources of legal validity – treaties, customs, the principles of law recognized by civilized nations, and judicial decisions and the writings of legal experts − represent a list of sources that has assisted the subjects of international law (mostly states) and officials in

[42] With the limited exception of the cases in which France enters into commercial agreements with other entities, and as part of the arbitration clause they agree that the laws of the UK govern the agreement.
[43] Besson, "Theorizing the Sources of International Law," 181; Mehrdad Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A. Hart," 989–90.

international institutions, permanent and ad hoc international tribunals, mediation and arbitration courts prior to and after the passing of the UN Charter.

That custom and treaties have long been identified as sources of law is evident in the way disputes were settled prior to 1945. Its predecessor, the Permanent Court of International Justice (1922-1946) dealt with 29 cases and 27 advisory opinions in its brief life.[44] Even at that time, courts relied on a body of customary and treaty rules, and on the practices and principles of developed legal system in making their decisions. In a book describing the work of the Permanent Court of International Justice published by the court in 1939 (and reissued by the ICJ in 2012), the sources of the law applied by the court are described as follows:

> 'The Court bases its decisions firstly upon international conventions, in so far as they establish rules expressly recognized by the litigant States or by the States directly interested in the question submitted; secondly, on international custom, as evidence of a general practice accepted as law; and thirdly, on the general principles of law recognized by civilized nations. The Court may also take into account judicial decisions and the teachings of the most highly qualified publicists of the various nations, but only as a subsidiary means for determining rules of law.'[45]

The UN Charter made these sources explicit. Today we are able to identify a more complex rule of recognition operating in international law that includes, in addition to Article 38,

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[44] Publications of the Permanent Court of International Justice (1922-1946) http://www.icj-cij.org/pcij/ (Accessed Oct. 24, 2016)

[45] The Permanent Court of International Justice: its Constitution and Work. Trilingual book (English, Spanish, French), first published in 1939, republished in 2012 http://www.icj-cij.org/pcij/serie_other/cpji-pcij.pdf (Accessed Oct. 24, 2016)

the whole of the UN Charter, including Article 103, which states that in case of conflict between members' obligations under the Charter and their obligations under any other international agreements, the Charter obligations shall prevail, the Vienna Convention on the Law of Treaties, legal principles and interpretive maxims that identify the prevailing law when rules or treaties conflict (such as *lex specialis* and *lex posterior*), some of the writing of the International Law Commissions, and many others.[46] The existence of all of these different rules operating at the same time does not mean that there are multiple rules of recognition and different officials recognize different rules. If this were the case, the international legal system would lack the unity required of a legal system. But in fact, even if there is some uncertainty, international lawyers recognize the same rules as part of a hierarchy of rules of validity and interpretation. In his admirable book on the relationship of WTO law with general international law, Joost Pauwelyn shows that despite the possibility of conflict between different sources of international law due to the decentralized, fragmented nature in which different legal regimes were created, legal practitioners resort to a common toolbox of rules, principles and interpretative maxims to create coherence and unity.[47] In this respect international law is not so different from domestic legal systems such as the United States in which a highly elaborate and multi-dimensional rule of recognition operates.[48]

Therefore, Hart was wrong to deny the existence and necessity of a rule of recognition in international law, given its extensive development and application, particularly during the 20th

[46] *Lex specialis derogat lege generali-special* law takes priority over general law. Treaty law is lex specialis (special law) with respect to general law. This means that if general law does not have the status of *jus cogens,* from which no derogation is permitted, then treaties supersede general law. *Lex posterior derogate legi priori* means that more recent law prevails over earlier law.
[47] Joost Pauwelyn, *Conflict of Norms in Public International Law: How WTO Law Relates to Other Rules of International Law*, 1 edition (Cambridge, UK; New York: Cambridge University Press, 2009), 89–153, 237–75.
[48] Kent Greenawalt, "The Rule of Recognition and the Constitution," *Michigan Law Review* 85, no. 4 (1987): 621–71, https://doi.org/10.2307/1288727.

century. Waldron and Payandeh have revealed the inadequacy of Hart empirical thesis with regard to international law. But they have Hart's failure to identify a rule of recognition in international law as evidence that Hart was wrong to deny international law the status of a legal system.[49] Indeed, this is part of an emerging consensus on the interpretation of Hart's view. Discussing Hart's view that there is no rule of recognition, and therefore no international legal system, Samantha Besson and John Tasioulas write:

> "While such a reductive view of international law may have been factually correct in 1961, it no longer is. General international law has internal rules that determine its own validity and may therefore be deemed an autonomous legal order, and this is true of international conventional law as much as of customary law."[50]

In contrast, my reconstruction of Hart's 'necessary and sufficient' criteria points to additional reasons to question the identification of international law with a legal system. Recall that the list contains a translation of Hart's 'two minimum conditions' into eight (or nine, depending on how you count), and a further three conditions that Hart discusses as essential but fails to explicitly include into his definition of law. The first eight are 1. the existence of primary rules, which 2. are habitually obeyed by the population, and 3. the existence of rules of recognition, 4. rules of change, and 5. rules of adjudication, which 6. are accepted as common public standards by public officials, 7. that there exist courts with compulsory jurisdiction, and 8. that there are rule-making and rule-changing bodies. The further three conditions that

[49] Waldron, "International Law: A 'Relatively Small and Unimportant' Part of Jurisprudence?" 217, 220-222, Payandeh, "The Concept of International Law" 989-990.
[50] Samantha Besson and John Tasioulas, "Introduction," in Besson and Tasioulas, *The Philosophy of International Law*, (OUP 2010), 10.

characterize all legal systems are 9. the generality of the rules both in terms of their content and range of applicability (to all the subjects within a given territory), 10. the presence of rules distinguished by their content, i.e. that criminalize certain types of behavior injurious to individual life and liberty and to the social life of the community, and 11. the presence of centralized coercive punishment as a response to rule violation.

While I will not be able to discuss any in detail how these criteria apply to international law, this list can launch a productive discussion of what it might mean for international law count as a legal system according to a reconstructed Hartian account of law. We can start to look backwards from the last condition, that of the necessity of centralized enforcement. In this case, as in others, Hart's statements are ambivalent and confusing. On the one hand, he seems to grant to the critics of international law that the fact that it lacks a legislature, courts with compulsory jurisdiction, and centralized enforcement, which features render international law more akin to primitive law than developed legal systems.[51] This is because Hart equates the lack of legislature and compulsory jurisdiction with the absence of rules of change and adjudication, and the lack of centralized enforcement with the ineffectiveness of the rules.[52]

On the other hand, and despite his insistence that centralized enforcement is necessary for law to be effective in general, Hart rejects the idea that centralized *international* sanctions are needed. He insists that international law can create obligations for its subjects – states – that make certain conduct mandatory, even in the absence of sanctions. To believe sanctions are necessary would be to take the intuitive but distorting picture of law as orders backed by threats as the yardstick by which to measure law-worthiness. The differences between states and individuals are such that in international law sanctions are not necessary to the same extent and

[51] Hart, 4–5, 214.
[52] Hart, 214.

they cannot be used as safely and efficaciously as they would be in municipal law. States differ in their strength more than individuals do, the prospects of success against an offending state are much smaller, even when groups of states rally against a bigger state, and the risks and likely costs much higher for all parties involved.[53] Hart's view that sanctions are not necessary in international law does not square with his earlier insistence that centralized enforcement is a necessary feature of law.[54] I believe Hart's initial implicit reliance on coercion as a necessary feature of any legal system was right, because I am persuaded by his insistence that it is one of the features that distinguishes law from other systems of social rules or from morality more generally. While Hart was right that coercive punishment at the international level raises important concerns, he was wrong to dismiss it as counterproductive and unnecessary. While I do not have the space to defend this point here, suffices to say that any credible set of rules prohibiting certain behaviors especially injurious to large groups of individuals and the international community as a whole would be authoritative and effective without coercive enforcement.

How does international law do on the other implicit and explicit criteria of his concept of law? Rules of change plainly exist in international law, since states make new treaties and revise old ones constantly. For example, at the GATT/World Trade Organization, rules regulating international trade have gone through numerous rounds of negotiations, each lasting many years, during which member countries both expanded the number of areas covered by regulations to issues such as services and intellectual property, and reviewed and changed old areas of

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[53] Hart, 219.

[54] Hart explains that coercive sanctions are indeed a necessary part of law: 'there are in a municipal system, as we have ourselves stressed, certain provisions which are justifiably called necessary; among these are primary rules of obligation, prohibiting the free use of violence, and rules providing for the official use of force as a sanction for these and other rules.' 218. But further on says that 'the factual background to international law is so different from that of municipal law' that 'there is neither a similar necessity for sanctions (desirable though it may be that international law should be supported by them) nor a similar prospect of their safe and efficacious use.' Hart, 219.

regulation covering trade in manufactured goods, industrial products, and textiles. The United Nations, although it does not act as a legislature, has fostered the creation of many new international agreements. One of the most important legal measure adopted by the UN members was the Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), which led to the creation of many new independent states and to the dramatic increase in the number of UN members. Among thousands of other countless treaties, a few stand out: the creation of the new International Criminal Court (2002), the Convention on the Elimination of All Forms of Discrimination against Women (1979), United Nations Convention on the Law of the Sea (1982), and the United Nations Convention Framework on Climate Change, the last of which went though many rounds of amendments and renegotiations, the last being the Paris Agreement of December 2015. That new treaties are created all the time and old treaties are superseded is proof that rules of change operate in international law.

Some of these rules of change were formalized in the Vienna Convention on the Law of Treaties (VCLT 1980). The VCLT applies only to treaties made by states and explains how treaties are made, enter into force, are changed, terminated, or become invalid. The VCLT has crystalized and developed key practices in customary law related to the negotiating and making of treaties among states. Additional rules of change and interpretive maxims such as *lex specialis* (special law supersedes general law) and *lex posterior* (more recent law supersedes older law) are deployed precisely because under conditions of constant change, an order of precedence between old and new agreements must be established to avoid confusion about what the law requires on a particular issue.

Hart could not foresee the development of VCLT, but the existence of customary rules of change was implicit in the effervescence around the creation of new international treaties in the

1950s. Therefore, Hart was not on solid ground to deny the existence of rules of change. The fact that he ties the existence of a rule of change to the presence of a legislature offers a clue into his reasoning. Hart believed that since international law lacks a legislature, it must lack rules of change. But as Waldron and Payandeh have also shown, there is no necessary connection between centralized law-making and law-changing institutions and rules of change.[55] While the UN acts as a facilitator, much of international law is made in a decentralized fashion by large groups of independent states acting jointly to resolve common problems. One possible explanation of Hart's error is that he associated the idea of a legal system too closely with the centralized law-making institutions of a modern state, leading him to look for its vestiges as markers of legal systems elsewhere.[56] International law clearly contains general rules of change in the VCLT and in specific areas and law-making institutions such as the WTO.

When it comes to rules of adjudication, the assessment of international law becomes more complicated. Part of the problem is that Hart did not specify what counts as an adequate rule of adjudication.[57] But one criterion he did attached to rules of adjudication is courts with compulsory jurisdiction, which international law currently lacks. The fact that the judgments of the international Court of Justice are generally obeyed does not make up for the fact that states cannot be brought under its jurisdiction against their will, as Hart rightly points out.[58] For those who want to show how similar international law *as a legal system* is with domestic law, Hart offers the sobering challenge that 'whereas a municipal court has compulsory jurisdiction to

[55] Waldron, 213-214, Payandeh, 980.
[56] On this point see also Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A. Hart," 980, 986, 988.
[57] On p. 93- 94 Hart says that 'The history of law does, however, strongly suggest that the lack of official agencies to determine authoritatively the fact of violations of a rule is a much more serious defect; for many societies have remedies for this defect long before the others.' In this passage of Hart is not so clear on whether the agencies he thinks are necessary should serve both adjudicative and enforcing purposes (courts and police), or whether authoritative determination only requires courts, and is so if a centralized judicial system is required.
[58] Hart, *The Concept of Law*, 232.

investigate the rights and wrongs of 'self-help' and to punish a wrongful resort to it, no international court has similar jurisdiction.'[59]

Waldron denies the necessity of courts with compulsory jurisdiction. Referring to the rule of adjudication, he says that "it is not part of the abstract understanding of this kind of secondary rule, for example, that the institution in question must have compulsory jurisdiction."[60] But here is where Waldron believes he has pointed out an inconsistency, whereas he has merely identified an underexplored feature of Hart's system that gives rise to a misunderstanding about what his account of law really demands. The necessity of courts with compulsory jurisdiction comes from Hart's insistence that law contain general, non-optional primary rules of conduct, whose violations are ascertained finally and authoritatively by agents specially tasked for this purpose, and whose judgments are effective. Since in international law states cannot be brought before courts without their consent, many violations are neither authoritatively ascertained, nor challenged or punished.

The absence of courts with compulsory jurisdiction was a feature of international law during the 1950s and it continues to be a feature today despite the proliferation of dispute resolution forums. The closest we have come to a court with compulsory jurisdiction is the International Criminal Court (ICC), whose jurisdiction applies to the citizens and officials of all member states, of states that have special agreements with the ICC, and of other states which are referred to the ICC by the Security Council. This extends the authority of the ICC potentially to cover all states, but given the indirect mechanism of referral, the lack of prosecutorial capacity to pursue the citizens and officials of non-member states and the capriciousness of the Security Council veto mechanism, the ICC cannot be said to enjoy compulsory universal jurisdiction yet.

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[59] Hart, 233.
[60] Waldron 215.

Yet general rules of adjudication seem to be widely shared by officials in courts, tribunals and arbitration proceedings in international law. The Fragmentation Study commissioned by the UN from the International Law Commission details principles and maxims that are widely used to interpret international rules and solve conflicts between rules arising in different areas of international law, such as considering a particular area of law in light of general international law, relying on precedent, and so on.[61] These count as rules of adjudication, namely rules that enable officials to discern and pass judgment on violations of primary rules.

But the main difficulty resides in the insufficiently precise notion of obedience. One of the main feature of a legal system is the primary rules of obligation are widely obeyed by 'most of the people most of the time.' Hart does not elaborate on what this means as an evaluative criterion, giving the less helpful explanation that obedience is like baldness. Just as it is not possible to say precisely the point at which a person becomes bald, so it is difficult to say precisely when a system changes from the absence of widespread obedience to its presence.[62] But this leaves us few resources to assess the extent of compliance or answer those who might contest the fact that the rules of international law are widely accepted and obeyed.

Therefore, on the first six criteria I have identified above as conditions for the existence of a legal system, namely 1. the existence of primary rules, which 2. are habitually obeyed by the population; 3. the existence of a rule of recognition, 4. rules of change, and 5. rules of adjudication, which 6. are accepted as common public standards by public officials, we can say the following. Conditions 1,3,4,5, and 6 are met. We are unable to assess whether international law meets condition 2, and the most we can say is that it is possible that it does. Condition 7. that

[61] Report of the Study Group of the International Law Commission, "Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law," 2006, 115–205, http://www.un.org/ga/search/view_doc.asp?symbol=A/CN.4/L.682.
[62] Hart, *The Concept of Law*, 56.

the courts must have universal jurisdiction, is not met, and 8. that there exist legislative bodies is met, even though it does not take the form of a legislature familiar from domestic legal system, but rather of decentralized law-making consisting mainly in groups of states.

Understanding the complexity of Hart's criteria enables us to better understand his concern for the lack of rules of adjudication in international law, and that they cannot be as easily dismissed as Payandeh does. Payandeh claims that since Hart wrongly denied that international law contains a system of adjudication, we can reject his concern as unfounded.[63] However, understanding the multidimensional account of what Hart means by a system of adjudication, which includes rules of settling disputes as well as courts with universal jurisdiction which are effective in inducing states to comply with their decisions, allows us to acknowledge that some of his concerns are real and have not be addressed at this point in the evolution of international law.

On the subsequent formal and substantive criteria for primary rules, namely that primary rules must be 9. general in terms of their content and range of applicability (to all the subjects within a given territory), 10. criminalize certain types of behavior injurious to individual life and liberty and to the social life of the community, and 11. be backed by the presence of centralized coercive punishment as a response to rule violation, we can assert the following. Condition 9 is met because customary rules as well as the UN Charter apply generally. The UN Charter contains general prohibitions on the use of force and for the protection of territorial sovereignty, while customary humanitarian law contains restrictions on the use of violence in war. Condition 10 is not met, since general rules of criminal law limiting what states do to each other and their own citizens are fairly weak, do not come attach to sanctions and do not apply to all states. The

[63] Mehrdad Payandeh, "The Concept of International Law in the Jurisprudence of H.L.A. Hart," 985.

important exception here is jus cogens norms, which describe general principles of international law such as prohibitions against slavery, genocide, and crimes against humanity, from which no derogation is ever allowed. But international courts have made it clear that in most cases, state immunity trumps jus cogens, and therefore the latter lack the universally binding character that its proponents believe it should have. [64] Condition 11 is obviously not met, and one must agree with Hart that the presence of the Security Council does not qualify as a general enforcement mechanism, since the Security Council authority is limited to the UN Charter (or a subset of it), and there is much more international law besides it that lacks centralized enforcement, including international criminal law.

To sum up, of the 11 formal and substantive conditions, seven (1, 3, 4, 5, 6, 8, 9,) are met, one (2) leaves room for considerable uncertainty, and three (7, 10, 11) are clearly not met. What practical and theoretical implications can we draw from this exercise? Given the shortcoming of international law in meeting the criteria that are part of this expanded understanding of law, we must conclude that Hart was ultimately right in his judgment that international law does not meet the conditions of a legal system. But he was likely wrong that therefore it is merely a primitive legal system. International law exhibited secondary rules of significant complexity even during Hart's time, including an ultimate rule of recognition, despite failing to develop certain parts the complex institutional machinery to make those rules effective. This exercise of evaluating the nature of international law is important, because, at the very least, looking at Hart's view through this new lens helps us see that international law is much closer to fulfilling Hart's union of primary and secondary rules test. It displays secondary rules of recognition, change, and adjudication, (even if imperfectly), and does therefore contain a high

[64] Reference omitted for blind review.

degree of systematicity and institutionalization, but it does not meet other important conditions that Hart himself highlighted in various parts of the book but did not make explicit in his definition. We are led to question, with Michael Giudice, the very distinction between primitive law and fully developed legal systems that serves for Hart as the basis for the identification and classification of law.[65]

D. Conclusion

Hart's view of the law contains a plausible and widely adopted characterization of the necessary and sufficient features of a legal system.[66] Yet Hart obscured the significant complexity of his criteria. The purpose of this argument was to bring to light numerous features of Hart's view that he left in the background. I have translated 'minimal conditions' for the existence of a legal system, and I proceeded to assess the nature of international law through the prism of this new account of law. Understanding the ways in which international law falls short of meeting these criteria endorses Hart's conclusion that international law is immature, but not for the reasons he gave and not to the extent that he argued. If international law is not quite a mature legal system, it has long moved beyond a primitive legal order towards a sophisticated set of secondary rules and institutions entrusted with their interpretation and application.

The analysis developed here turns a mirror on Hart's own view. It places into sharper relief the complexity, vagueness, and limitations of some of the criteria he uses, such as

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[65] Michael Giudice, "Hart and Kelsen on International Law," *Oxford Studies in Philosophy of Law*, Volume 2, Leslie Green and Brian Leiter, eds., OUP, 2013, 164. See also Giudice, "The Sources and Systematicity of International Law: A Philosophical Perspective," in *The Oxford Handbook of the Sources of International Law*, Jean d'Aspremont, Samantha Besson, Sévrine Knuchel eds., (OUP 2017) 593-599.

[66] For a contrary view about the usefulness of the Hartian framework, see Jason A. Beckett, "The Hartian Tradition in International Law," *The Journal Jurisprudence* 1 (2008): 51–83.

widespread obedience, or the existence of general and mandatory rules, which turn out to be important for the evaluation of international law. The argument offered here has reinforced what Hart always suspected but failed to articulate persuasively: that international law raises significant challenges to our understanding of law based mostly on the model of centralized states and it invites us to re-imagine the conceptual map that best capture the nature of law.